

EXHIBIT 2

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 * * * * *

4 ACUSHNET COMPANY
5 Plaintiff

6 VERSUS

7 SPALDING SPORTS WORLDWIDE
8 Defendant

9 * * * * *

CA-00-11631-DPW

10 BEFORE THE HONORABLE DOUGLAS P. WOODLOCK

11 UNITED STATES DISTRICT COURT JUDGE

12 HEARING ON MOTION FOR PRELIMINARY INJUNCTION

13 AUGUST 23, 2000

14 APPEARANCES:

15 JAMES COYNE KING, ESQ., Hanify & King, P.C.,
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17 on behalf of the Plaintiff

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19 Pennie & Edmonds, LLP, 1155 Avenue of The Americas,
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21 Defendant

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24 on behalf of the Defendant

25 PETER A. ARTURI, ESQ., Spalding Sports Worldwide,
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Courtroom No. 1 - 3rd Floor
1 Courthouse Way
Boston, Massachusetts 02210
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Pamela R. Owens - Official Court Reporter
1 Courthouse Way - Suite 3200
Boston, Massachusetts 02210

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1 CA-00-11631-DPW

2 AUGUST 23, 2000

3 THE COURT: Well, let me start with a
4 preliminary matter. And that is why any longer these
5 materials should be filed under seal. What difference
6 does it make?

7 MR. KING: Your Honor, if I may, James King,
8 Hanify & King for Acushnet Company. Just to identify
9 for you, counsel with me today are Peter Vogl and Gianni
10 Servodidio, both from Pennie & Edmonds in New York.
11 There's a motion to admit pro hac vice. I just wanted
12 to identify for the Court --

13 THE COURT: Right, but let me -- I appreciate
14 that. I just want to understand why any longer. Now
15 that the parties have put in dispute --

16 MR. VOGL: May I address that?

17 THE COURT: Let me tell you my perception.

18 MR. VOGL: Yes.

19 THE COURT: Now that the parties have put in
20 dispute the applicability of this settlement agreement
21 -- and that seems to be the issue -- I'm loathe to keep
22 under seal anything that I have to act on. The public
23 is entitled to know what it is that the Court is ruling
24 on. And one of the things I'm ruling on is the
25 construction of not an aging, but somewhat elderly,

1 settlement agreement.

2 MR. MIRENDA: Your Honor, from our
3 perspective, the provisions at issue, we have no
4 objection at all that they become part of the public
5 record. In the settlement agreement, there are some, I
6 believe, confidential royalty or other financial-related
7 information that perhaps could be redacted from whatever
8 copy is made public. But from our perspective,
9 certainly there's no issue as to the provisions.

10 MR. VOGL: I think we can work with that,
11 Your Honor. We can redact some of the numbers.

12 THE COURT: As to the royalty stuff, that's
13 fine because you're not asking me to decide the question
14 of royalty.

15 MR. VOGL: No, sir.

16 THE COURT: Let me just deal with this
17 dismissal or the question raised by the agreement.
18 How would this -- assume that I were to enforce it in
19 respect of this dispute, which clearly was not in the
20 contemplation of the parties at the time, what's the
21 mechanism of enforcement? You go down to the District
22 of Delaware and file an action; is that what happens?
23 I mean, there's a lengthy period of time for the
24 informal resolution of this matter which seems to
25 foreclose the availability of injunctive relief. If

1 this were an arbitration provision, I'd know how to deal
2 with this under the Federal Arbitration Act. But this
3 isn't an arbitration provision. It's self-help
4 essentially.

5 MR. MIRENDA: A mediation provision. Yes,
6 Your Honor.

7 THE COURT: So, how do I enforce it?

8 MR. MIRENDA: I would suggest that you
9 transfer this matter to the District of Delaware, which
10 is the court that ultimately ought to be --

11 THE COURT: If this is to be -- I'm being
12 asked to construe what this does. If I do that --
13 address me in a different way. I'm the District of
14 Delaware now. What do I do? Don't I have to sit back
15 and wait 90 days for you to work this all out?

16 MR. MIRENDA: Yes, Your Honor. That's what I
17 would suggest. The District of Delaware would stay the
18 action; direct the parties to follow the procedures that
19 are set forth in the agreement; and if those procedures
20 result in what the parties contemplate at the time,
21 which would be a negotiated resolution, then that ends
22 the matter.

23 THE COURT: If it doesn't work?

24 MR. MIRENDA: If it does not, then it steps
25 forward to --

1 THE COURT: So the parties have foreclosed
2 interlocutory relief in aid of a mediation process.
3 That is to say, the disclosure of this or the actual
4 roll-out -- put to one side the preliminary roll-out.
5 But the actual roll-out, delivery, and that sort of
6 thing, if it was improper, it's not something that any
7 court can bar?

8 MR. MIRENDA: Under the agreement between the
9 parties, Your Honor, that's certainly our position, that
10 that's what the parties agreed to. And, frankly, Your
11 Honor, these are parties who are not strangers to each
12 other. These are parties who have had constant and
13 competitive battles certainly, and legal battles going
14 back over a number of years. This settlement agreement
15 was -- the settlement agreement issue was the
16 culmination of four or five separate actions that all
17 have clustered around --

18 THE COURT: Golf balls.

19 MR. MIRENDA: -- golf balls. But these are
20 companies that are in that industry that are battling
21 with each other constantly, and came to the conclusion
22 that -- for good business reasons on both sides -- this
23 process ought to happen anytime there was a dispute over
24 these kinds of issues, intellectual property.

25 THE COURT: Well, you say these kinds of

1 issues. It's intellectual property disputes. Is that
2 it -- everything?

3 MR. MIRENDA: Intellectual property and
4 advertising, Your Honor. That would mean trademark,
5 patent, and claims relating to advertising.

6 THE COURT: Copyright?

7 MR. MIRENDA: Copyright, although neither
8 party -- that's not a primary issue for either party,
9 but certainly --

10 THE COURT: Well, it may not, but I just want
11 to understand if this thing scoops up all of that --

12 MR. VOGL: Your Honor, may I speak?

13 THE COURT: You may in a moment, --

14 MR. VOGL: Sure.

15 THE COURT: -- Mr. Vogl. What it says -- let
16 me just look at it.

17 MR. MIRENDA: It's Section (12), Your Honor.

18 THE COURT: Thank you.

19 MR. MIRENDA: At page 12 of Exhibit 1 to our
20 motion to dismiss.

21 THE COURT: Right.

22 MR. MIRENDA: I'm sorry. That's the
23 confidentiality provision. Of (19), Your Honor. I'm
24 sorry.

25 THE COURT: So, Mr. Vogl?

1 MR. VOGL: Your Honor, I just would like to
2 ask if Your Honor did, in fact, have an opportunity to
3 review or at least receive and review our paper that we
4 filed in response to the defendant's motion.

5 THE COURT: I have. I want to focus on this a
6 bit.

7 MR. VOGL: Yes, sir. May I explain our
8 position?

9 THE COURT: Let me understand what you say the
10 scope of (19) is.

11 MR. VOGL: Yes, sir.

12 THE COURT: Any dispute arising out of or
13 related to patents, that's not limited to golf ball
14 business patents, is it?

15 MR. VOGL: No, it's not.

16 THE COURT: Okay. Other intellectual property
17 owned or controlled by the parties, what does that mean?

18 MR. VOGL: That's not limited to patents
19 either, Your Honor.

20 THE COURT: No, not limited to patents. But
21 is it limited to the golf ball business?

22 MR. VOGL: Yes, Your Honor. If read in
23 conjunction with paragraph (g), which is the purpose of
24 this entire agreement set forth on page three --

25 THE COURT: Well, but I asked you earlier --

1 maybe I didn't enunciate it clearly -- are you saying
2 that any dispute arising out of or relating to patents
3 includes patents other than golf ball business patents?

4 MR. VOGL: No, Your Honor.

5 THE COURT: It only includes golf balls?

6 MR. VOGL: Golf ball patents. Yes, sir.

7 THE COURT: Okay. And, similarly,
8 advertising?

9 MR. VOGL: Relating to golf balls, Your Honor.

10 THE COURT: Now, go to (g).

11 MR. VOGL: Yes, sir.

12 THE COURT: And it says that their purpose is
13 to settle disputes having to do with the manufacture of
14 golf balls -- the present dispute?

15 MR. VOGL: Yes.

16 THE COURT: Avoid other or similar patents. I
17 suppose that could refer to patent disputes arising out
18 of a golf ball business?

19 MR. VOGL: Yes, Your Honor.

20 THE COURT: And then striking a procedure
21 for attempting to resolve expeditiously such new
22 intellectual property in advertising disputes as
23 may arise between them, not similar, but any new
24 intellectual property and advertising disputes as may
25 arise between them.

1 MR. VOGL: Yes.

2 THE COURT: So it doesn't include the
3 reference to present disputes. It doesn't include the
4 reference to similar patent disputes. It speaks more
5 broadly, doesn't it?

6 MR. VOGL: But it does use the word "such,"
7 Your Honor. It doesn't say "any." It says "such new
8 intellectual property and advertising disputes" which
9 refers back to manufacture, sale, and advertising of
10 golf balls as aforesaid in clause (i).

11 THE COURT: I'm not sure it does. You say
12 "such as a reference to golf ball disputes or a
13 reference to similar." But an ordinary reading of that
14 would be -- just standing alone -- as a kind of general
15 reference to new intellectual property and advertising
16 disputes.

17 MR. VOGL: Your Honor, if I could also draw
18 your attention, I think reading clauses without reading
19 the entire agreement that's proposed --

20 THE COURT: No.

21 MR. VOGL: I'm not suggesting you are, Your
22 Honor.

23 THE COURT: No. Listen, we're taking a stroll
24 through the forest. I've identified some of the trees.
25 You're going to help me, too.

1 MR. VOGL: Of course.

2 THE COURT: But go ahead.

3 MR. VOGL: Paragraph (15), if I could indicate
4 that paragraph -- if I could just describe paragraph (g)
5 as setting out the purpose of this agreement, I would
6 argue, Your Honor, that paragraph (15) is quite clear
7 what the end game -- what the contemplated end game --
8 was going to be when this agreement was executed. And
9 that end game relates exclusively to the golf ball
10 businesses. Successors, transferees, and assigns of
11 substantially all of their respective golf ball
12 businesses are bound by this agreement. No one else,
13 Your Honor. At the time this agreement was drafted,
14 Spalding and Acushnet were both in a variety of other
15 businesses beyond golf balls. They did not specifically
16 address or mandate that successors of any of their other
17 businesses were bound by this agreement. So, it has to
18 be, Your Honor, in a full reading of this agreement, in
19 conjunction with paragraph (15) being a part of it, the
20 golf ball business was specifically called out as being
21 the purpose of the agreement and anybody in the future
22 who acquired -- to whom the business was transferred or
23 to whom it was assigned -- would, in fact, be obligated
24 to live with this agreement if it involved the
25 respective golf ball businesses.

1 THE COURT: Well, but why can't someone create
2 one of these things and say, "Well, we pretty much know
3 what any such new disputes will be in the golf ball
4 business, but we don't know what they will be in
5 others." And, so, rather than binding our successors as
6 to the others, the paragraph or the subsection (2) of --
7 is it (19) or (g)?

8 MR. VOGL: You're going back to (g) being the
9 purpose of the agreement and (19) being --

10 THE COURT: Yes, (g). If I say, look, this
11 successor agreement is meant to deal with items (i) and
12 (2) and we're not imposing this obligation on (3)
13 which can be the entire universe of intellectual
14 property disputes that we don't know about, is that --
15 how is that wrenching this out of context?

16 MR. VOGL: Well, Your Honor, the parties were
17 certainly aware at the time of the execution of this
18 agreement that they had other businesses that they could
19 have expressly referenced either in (g) or in (15).

20 THE COURT: But how do they -- let's assume
21 that they did it in this -- let's assume this: That
22 this was meant to cover all their intellectual property
23 disputes that occur in the future in addition to the
24 golf ball business ones that are identified. Is there
25 anything inconsistent with that larger purpose in the

1 successor clause? How would you write the successor
2 clause any differently if that were the case?

3 MR. VOGL: I would not limit it to golf ball
4 businesses, Your Honor.

5 THE COURT: Well, no. But let's say that both
6 of you decide that, hey, we don't know these other
7 businesses yet. We don't know exactly how those are
8 going to work. So, let's just leave that out of the
9 successor --

10 MR. VOGL: Your Honor, just so you're clear,
11 there was an ongoing vital business at Spalding and at
12 Acushnet in other areas called clubs, called carts.

13 THE COURT: I understand all of that.

14 MR. VOGL: Okay.

15 THE COURT: The question is: Is there
16 anything really structurally inconsistent with having a
17 successor clause that is more narrow than a broadly read
18 "Purpose" clause? And I don't think there is, is there?

19 MR. VOGL: Well, assuming you're reading the
20 "Purpose" meaning (g), Your Honor, if you read "such" to
21 mean any intellectual property as opposed to just that
22 which is referred to at (i) and (2) --

23 THE COURT: With that potential reading.

24 MR. VOGL: -- then no. But I would submit,
25 Your Honor, that that is not the reading --

1 THE COURT: Okay. Is there any other basis in
2 this --

3 MR. VOGL: Well, Your Honor, the definitional
4 section of this agreement certainly speaks to golf balls
5 and the golf ball business. It doesn't speak to any
6 other component of the businesses of the companies. So,
7 again, it focuses specifically. It didn't define other
8 aspects of their business that would be also included
9 within this agreement and mandated mediation by this
10 agreement.

11 THE COURT: Well, but me understand this.
12 Let's look at (a). And he says that you're required to
13 notify each other prior to filing suit of adverse patent
14 claims. Is that only in the golf ball business?

15 MR. VOGL: I'm sorry. Where are you reading,
16 Your Honor?

17 THE COURT: (a) on page -- well, it must be
18 page one.

19 MR. VOGL: Yes.

20 THE COURT: "In situations of patent
21 infringement, it requires that prior to filing suit" --

22 MR. VOGL: Yes, I see.

23 THE COURT: -- and then it says, "limited to
24 patent infringement in the golf ball business."

25 MR. VOGL: Yes, Your Honor.

1 THE COURT: And the reason I get to that is
2 because (g) says that.

3 MR. VOGL: Correct. The other thing you might
4 need to know, Your Honor, is that the 1990 agreement was
5 also limited to golf balls. That's referenced in (a).

6 THE COURT: Okay. Did it have the same
7 language all the way through?

8 MR. VOGL: I don't believe there was a
9 mediation provision in that agreement. There may be,
10 but it's not -- it does not -- my colleague is
11 mentioning that there is.

12 THE COURT: It says there is a duty to seek
13 a non-litigious resolution including non-binding
14 mediation, if necessary. So, it sounds to me like -- I
15 don't know what it sounds to me like.

16 MR. VOGL: Your Honor, the other thing -- if I
17 could draw your attention to it -- in (g) is, again, the
18 reference in little (3) where it says "strengthen the
19 procedure for attempting." It doesn't say "create." It
20 doesn't say "implement." It doesn't say "provide the
21 procedure for attempting to resolve it." It talks about
22 strengthening.

23 THE COURT: Do either of you have the 1990
24 agreement?

25 MR. VOGL: I do, Your Honor. May I bring it

1 up?

2 THE COURT: Yes. Why don't you just pass it
3 up? Do you have a copy of it?

4 MR. MIRENDA: No, Your Honor.

5 THE COURT: Let me just take a look at it.

6 [Pause] Why didn't this one work? What happened?

7 MR. VOGL: It is my understanding, Your Honor,
8 that there was litigation that was initiated by Spalding
9 on these golf balls that were eventually the subject of
10 the 1996 agreement. And upon bringing that case -- that
11 case was brought in Cleveland, Ohio -- we brought an
12 action in Massachusetts for declaratory judgment. The
13 court here in Massachusetts transferred the case as a
14 second filed case back to Cleveland. The court in
15 Cleveland, without rendering an opinion, sent the case
16 to Delaware because both parties are incorporated in
17 Delaware.

18 THE COURT: You're giving me ideas.

19 MR. VOGL: I hope not. Both parties are
20 incorporated in Delaware. That's why they were sent.
21 And the judge in Cleveland didn't want to hear the case.
22 We never got a ruling on why.

23 THE COURT: He just sent it to Delaware.

24 MR. VOGL: I mean, as you can see --

25 THE COURT: But did you follow the --

1 MR. VOGL: There was no mediation proceeding
2 in that case, Your Honor. Spalding did not honor the
3 provisions of that agreement that require mediation and,
4 therefore, it was, in fact, their case that was filed in
5 Cleveland.

6 The other thing worthy of note perhaps, Your
7 Honor, is that in 1998, there was a proceeding filed by
8 Acushnet against Spalding -- actually, the Etonic
9 Division of Spalding in Delaware -- and that was on a
10 footwear matter. And, specifically, in that case, the
11 Spalding folks did answer the complaint and raised as an
12 affirmative defense the contract, but did not move to
13 suspend the proceedings, stay, or in any way try to
14 preclude the court --

15 THE COURT: So there hasn't been a ruling on
16 that? I mean, there is no ruling by the court as to the
17 scope of the --

18 MR. VOGL: That is correct. Well, eventually,
19 it was settled. That case was settled, Your Honor.

20 MR. MIRENDA: From our perspective, Your
21 Honor, obviously, the fact that that case was settled
22 when the parties had an opportunity to avail themselves
23 of negotiation --

24 MR. VOGL: It took eight months, Your Honor.

25 THE COURT: Well, the short of it is I'm not

1 absolutely sure about this because I haven't given it
2 the full consideration that it will require. But my
3 first cut at it is that this '96 settlement agreement
4 does not mandate the transfer of this kind of case, that
5 really the scope of the settlement agreement is the golf
6 ball business. And it is not meant to extend to the
7 golf shoe business. That's at least a preliminary
8 determination that I make before reaching how we're
9 going to resolve this on an interlocutory basis. I may
10 change my view about that, but I have got to do it on a
11 likelihood of success on the merits. One of the
12 likelihoods of success on the merits is whether or not
13 that they have been mandated in some sort of alternative
14 dispute resolution mechanism. I don't know find that
15 there has been on the basis of what I now know. I'm
16 passing back the 1990 agreement. You'll make a filing
17 of that and make it available to counsel.

18 MR. VOGL: I will, Your Honor, certainly.

19 THE COURT: So, now we're on to the question
20 of what to do on interlocutory relief. Let me just ask
21 you, Mr. Vogl, what took you so long?

22 MR. VOGL: Your Honor --

23 THE COURT: I mean, it's not the same as the
24 one I had before --

25 MR. VOGL: Right.